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Supreme Court, U.S.
FILED

04-871 OCT 28 2004

OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

EXUM WALKER,
Petitioner,

v.

JAMES CROSBY,
Secretary, Florida Department of Corrections, and
CHARLIE CRIST,
Attorney General of the State of Florida
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FILED
May 9, 2004

EXUM WALKER

Petitioner

v. CASE NO. 6:01-cv-53-Orl-31KRS

SECRETARY, DEPARTMENT OF CORRECTIONS, et al.,

Respondents

ORDER

This case is before the Court pursuant to a remand by the Eleventh Circuit Court of Appeal. *See* Doc. No. 21, filed September 15, 2003.

Background

Petitioner initiated this action for habeas corpus relief pursuant to 28 U.S.C. section 2254, alleging essentially two claims for relief hi his habeas petition: first, that he received ineffective assistance of appellate counsel, and second, that he was resentenced to a harsher sentence in violation of his due process rights.

On March 13, 2001, the Court entered an Order dismissing the case with prejudice (Doc. No. 10), determining that the petition was untimely. Petitioner appealed, and the Eleventh Circuit Court of Appeals granted a certificate of appealability limited to the following issues: 1) "Whether individual claims within a single habeas petition may ne reviewed separately for timeliness . . . ."; and 2) "Whether, in this case, the district court properly dismissed Walker's 28 U.S.C. § 2254 habeas petition as untimely." *See* Doc. No. 17, filed July 31, 2001. The appellate court then entered a written, published opinion, in which it concluded that Petitioner's habeas petition was filed within the one-year limitation period

provided in section 2244(d)(1).[1] *See* Doc. No. 21, filed September 15, 2003. Therefore, this Court's Order of March 13, 2001, was reversed.

On September 17, 2003, the Court entered an Order (Doc. No. 22) requiring Respondents to file a Supplemental Response to Petition. On November 28, 2003, Respondents filed a Supplemental Response to Petition (Doc. No. 26).

Procedural History

The procedural history of this case is set forth in the Court's Order of March 13, 2001, and is incorporated herein (Doc. No. 10).[2]

Discussion

1. Claim One

Petitioner avers that he received ineffective assistance of appellate counsel because of the following: 1) counsel failed to argue that it was fundamental error for a judgement of conviction to be entered with regard to count one of the information in case number CR89-6994 because it disjunctively alleged the commission of two separate and distinct crimes; 2) counsel failed to argue that it was fundamental error and presumptively prejudicial for the trial court to allow the State, at the close of the case, to amend the information in case number CR89-6994 to allege lewd act upon a child, 3) counsel failed argue that the trial court erred when it denied Petitioner's request for a judgement of acquittal at the close of the State's case and at the close of all the evidence; and 4) counsel failed to argue that the trial court erred when it refused to accept his plea of guilty as to count one of the information in case number CR88-9379.

a. Legal Standard

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[1] *See Walker v. Crosby*, 341 F.3d 1240 (11th Cir. 2003)

[2] The Court notes that Petitioner initiated this action *pro se* but that Petitioner is presently represented by counsel.

It is well established that a defendant has the right to effective assistance of counsel on appeal. *Alvord v. Wainwright,* 811 F.2d 1282, 1291 (11th Cir.), *cert. denied,* 469 U.S. 956 (1984). The standard for analyzing ineffective assistance claims is the same for trial and appellate counsel. *Matire v. Wainwright,* 811 F.2d 1430, 1435 (11th Cir. 1987). The Eleventh Circuit has applied the Supreme Court's test for ineffective at trial to guide its analysis of ineffective assistance of appellate counsel claims. *Heath v. Jones,* 941 F.2d 1126, 1130 (11th Cir. 1991), *cert. denied.* 502 U.S. 1077 (1992).[3]

Appellate counsel need not raise issues that he (or she) reasonably concludes will not be considered on the merits by the appellate court. *Francois v. Wainwright,* 741 F.2d 1275, 1285 (11th Cir. 1984). Likewise, appellate counsel need not brief issues reasonably considered to be without merit. *Alvord,* 725 F.2d at 1291. Appellate counsel must be allowed to exercise his (or her) reasonable professional judgement in selecting those issues most promising for review, and "[a] brief that raises every colorable issue runs the risk of burying good arguments . . . ." *Jones v. Barnes,* 463 U.S. 745, 753 (1983)

b. Issues One and Two

Petitioner argues in issue one that counsel failed to argue that it was fundamental error for a judgement of conviction to be entered with regard to count one of the information in case number CR89-6994 because it disjunctively alleged the commission of two separate and distinct crimes. Issue two involves the alleged failure of counsel to argue that it was fundamental error and presumptively prejudicial for the trial court to allow the State at the close

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[3] The Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984), established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance. The first prong of the *Strickland* test requires that the petitioner demonstrate that counsel's performance was deficient and "fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 688. The second prong of the *Strickland* test requires the petitioner to show that the deficient performance prejudiced the defense. *Id.* at 687.

of the case, to amend the information in cane number CR89-6994 to allege lewd act upon a child.

Petitioner never raised objections to these matters at the trial level.[4] Under Florida law, the failure of trial counsel to object at trial bars appellate review. *Jackson v. Dugger,* 931 F.2d 712, 715 n.7 (11th Cir.), *cert. denied,* 502 U.S. 973 (1991); *Davis v. State,* 728 So.2d 341 (Fla. 1st DCA 1999) (holding that issues regarding the denial of the defendant's motion to suppress and admission into evidence of his statements to police were not preserved for appellate review, since no objection was made during the trial when the statements were admitted). The sole exception to this rule is when the error constitutes "fundamental error." *Jackson,* 931 F.2d at 715 n.7. However, Petitioner does not establish that the arguments complained of in issues one and two presented "fundamental error." Consequently, since these issues were not preserved for review on appeal, appellate counsel was procedurally barred from raising them on direct appeal and therefore were not deficient in failing to do so. *Id.* at 715.

c. Issue Three

Petitioner avers that counsel failed to argue that the trial court erred when it denied Petitioner's request for a judgement of acquittal at the close of the State's case and at the close of all the evidence. In particular, Petitioner argues that the Sate failed to prove the time elements of the offenses as alleged in the statement of particulars.

Pursuant to the Statement of Particulars filed by the State, the crimes occurred between July 30, 1988, and October 19, 1988. The State presented evidence at trial demonstrating that the crimes occurred after July 30, 1988, when the younger victim turned five, and before October 19, 1988, when Petitioner was arrested. (Transcript of Trial at 119, 125-26, 158, 275.)

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[4] In fact, as to issue two, Petitioner's counsel specifically indicated that there was no objection to the amendment of the information. (Transcript of Trial at 270-72.)

Under Florida law, "on a motion for judgement of acquittal, the court should not grant the motion unless, when viewed in a light most favorable to the state, the evidence does not establish the prima facie case of guilt." *State v. Williams*, 742 So.2d 509, 510 (Fla. 1st DCA 1999) (citations omitted). Further, "[a] defendant, in moving for a judgement of acquittal, admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence." *Id.* In light of the evidence presented by the State, it is apparent that the trial court properly denied the motions seeking a judgement of acquittal. Consequently, counsel's conduct was reasonable with regard to this matter, and Petitioner has not shown prejudice.

d. Issue Four

Petitioner contends that counsel failed to argue that the trial court erred when it refused to accept his plea of guilty as to count on of the information in case number CR88-9379. In case number CR88-0379, Petitioner attempted to plead guilty to one count and to then go to trial on the remaining counts. The State objected to the matter, and the trial court indicated that it would not accept the plea at that time but that it would review the matter at a later date. (Transcript of Plea Hearing Held on July 27, 1990 at 2-3.) At a subsequent plea hearing, pursuant to a written plea agreement, Petitioner pled guilty to two counts in case number CR88-9379, and the State agreed to enter a *nolle prosequi* as to the remaining counts. (Transcript of Plea Hearing Held on July 30, 1990 at 3-4.)

A plea bargain does not occur when "the defendant, for his own reasons, makes a unilateral offer to enter a particular plea which is neither initiated, approved nor responded to in any way but rejection by a representative of the state." *Stell v. State,* 366 So.2d 825, 826 (Fla. 4th DCA 1979). Petitioner simply had failed to show that the trial court erred when it rejected Petitioner's initial plea of guilty to one count, particularly in light of the fact that 1) the State had not entered into a plea agreement with Petitioner at the time, and 2) Petitioner entered into a written plea agreement with the State three days later. The Court finds that counsel's

conduct was reasonable with regard to this matter, and Petitioner has not shown prejudice.

e. The Appellate Brief Filed by Petitioner's Appellate Counsel

The record reflects that Petitioner's appellate counsel raised one issue on direct appeal, which dealt with the calculation of Petitioner's sentence. Petitioner's appellate counsel submitted an initial brief which was comprehensive, thorough, and well-argued. Certainly, the record clearly evinces the thoroughness and reasonableness of appellate counsel's work. *Cf. Thomas v. Scully,* 854 F.Supp. 944 (E.D.N.Y. 1994) (the appellate brief submitted by counsel clearly showed the thoroughness of counsel's work.) The fact that these other issues might have succeeded in the state appellate court "does not lead automatically to the conclusion that [Petitioner] was deprived of a constitutional right when his lawyer failed to assert such a claim." *Woodfork v. Russell,* No. 92-4301, 1994 WL 56933 (6th Cir. February 24, 1994) (unpublished opinion). As discussed by the district court in *Richburg v. Hood,* 794 F.Supp. 75 (E.D.N.Y. 1992),

> [T]he court simply notes that the decision of appellate counsel to choose among plausible options of appellate issues is preeminently a strategic choice and is "virtually unchallengeable." The petitioner has not even undertaken to demonstrate that the decision of his attorney not to raise this issue constituted an "unprofessional error" or that such error prejudiced his appeal.

id. at 78. In this case, the Court finds that appellate counsel's decision not to pursue the other issues was consistent with reasonable appellate strategy that, under the deferential standard of review articulated in *Strickland*, should not be second guessed. *See Gray v. White,* No. C-94-2434 EFL, 1997 WL 16311, at # 9 (N.D. Cal. January 6, 1997) ("appellate counsel does not have a constitutional duty to raise every nonfrivolous issue requested by defendant. The weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate counsel advocacy.")

(citations omitted); *Carlos v. Cruz,* No. CV 96-5209 (RED), 1997 WL 269591, at #4 (E.D.N.Y. April 21, 1997), *affirmed,* No. 97-2302, 1997 WL 829269 (2d Cir. December 8, 1997) (unpublished opinion) ("On appeal, counsel is not required to argue every non-frivolous issue, rather, the better strategy may be to focus on a few more promising issues so as not to dilute the stronger arguments with a multitude of claims.", moreover, the Court must not second-guess the reasonable decisions of appellate counsel to press certain issues instead of others, and the lack of success on appeal is not a basis to impugn appellate counsel's reasonable choices or performance).

Accordingly, in light of 1) the discretion afforded to appellate counsel in selecting those issues most promising for review, and 20 Petitioner's failure to demonstrate that these other issues would have been viable on appeal, the Court finds that appellate counsel's performance was not deficient and that Petitioner has not demonstrated prejudice.

2. Claim Two

Petitioner argues that, at re-sentencing, the trial court improperly changed the sentence in count IV to run consecutively to count III instead of concurrently to count III. Relying primarily on *North Carolina v. Pearce,* 395 U.S. 711 (1969), Petitioner argues that his constitutional rights were violated when he was resentenced to a harsher sentence.

At the outset, the Court notes it will express no opinion on the state trial court's interpretation of Florida law, and it would be inappropriate to conduct an examination of Florida sentencing law. A state's interpretation of its own laws or rules provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved. *See Carricales v. Wainwright,* 699 F.2d 1053, 1055 (11th Cir. 1983), *Llamas-Almaguer v. Wainwright,* 666 F.2d 191 (5th Cir. 1982). As stated by the Eleventh Circuit Court of Appeals in *Branan v. Booth,* 861 F.2d 1507, 1508 (11th Cir. 1988), *"[i]n the area of state sentencing guidelines in particular,* we consistently have held that federal courts can not review a state's alleged failure to adhere to its own

sentencing procedures." {Emphasis added); *see also Nichols v. Estelle,* 556 F.2d 1330, 1331 (5th Cir. 1977) (federal courts do not review a state's failure to adhere to its own sentencing procedures . . . ."), *cert. denied,* 434 U.S. 1020 (1978). "This limitation on federal habeas review is of equal force when a petition, which actually involves state law issues, is 'couched in terms of equal protection and due process,' " it must be denied. *Willeford,* 538 F.2d at 1198.

Further, in *Pearce,* the Supreme Court set out guidelines regarding vindictive sentencing occurring after a defendant successfully appeals a conviction (or convictions). The Court held that

> [D]ue process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

id. at 725. *Pearce* is inapposite here because that case involved a resentencing after a successful attack of a first conviction. *Pearce* involved starting anew after a conviction no longer existed; here, by contrast, the conviction stands and only the sentence was vacated in order that it could be corrected.

However, even if *Pearce* applied in this case, there is no sign of vindictive sentencing to support Petitioner's claim. Petitioner was not sentenced to a harsher sentence than was originally imposed. The terms of probation were the same length as that

which was originally imposed.[5] Consequently, this claim must be denied.

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The Petition for Writ of Habeas Corpus filed by Exum Walker is **DENIED**, and this case is **DISMISSED WITH PREJUDICE**. The Clerk of the Court shall enter judgement accordingly.

2. The Clerk of the Court is directed to close this case.

DONE AND ORDERED in Chambers at Orlando, Florida, this 9 day of March, 2004.

/s/
GREGORY A. PRESNELL
UNITED STATES CIRCUIT JUDGE

[5] At the original sentencing, the trial court imposed probation for a total term of 30 years. At resentencing, the trial court imposed probation for a term of 15 years as to each count, with the terms to run consecutively.